

## A PARTIAL CHECK LIST FOR TENTH CIRCUIT BRIEFS

**CAVEAT:** Some of these suggestions are actual requirements under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules—hence they are not really suggestions. Others are my opinions, but opinions that I have found most members of my court agree with. As the national and local appellate rules change from time to time, use of this checklist will not substitute for review of current rules. This list is a judicial effort to *help* before you stand in the rarified air of the highest Appellate Court in the Land. (Denver is 5280 ft.).

Legend: Regular type tends to be substantive rules; *italicized type indicates my personal opinion or suggestion*; ***bold italics indicate that although the suggestion is mine, I think it is very important, and I have discussed it with colleagues who share my view.*** Comments in “quotes” come from either our Clerk of the Court or our Chief Deputy Clerk.

### A. COMPLIANCE WITH COURT RULES

- ☐ Does the cover page of the brief include a statement as to whether or not oral argument is requested? (i.e., “Oral argument desired.”)  
10th Cir. R. 28.2(C)(4); see 10th Cir. R. 1.1. (Explanation: important to “screening;” important to illustrate rule compliance.)
- ☐ Does the brief contain a table of contents that is an immediately recognizable snapshot of the case?  
Fed. R. App. P. 28(a)(2)
- ☐ Does the brief contain a table of authorities: cases (alphabetically arranged), statutes, and other authorities, and a statement of prior or related appeals?  
Fed. R. App. P. 28(a)(3); 10th Cir. R. 28.2(C)(1)

- ☐ Does the brief contain a statement of the grounds for appellate jurisdiction and a statement of the subject matter jurisdiction of the district court or agency, including dates showing timely filing, and citations of legal authority? (Make express reference to a statement of the grounds for subject matter jurisdiction in district court—especially important now in light of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998)).  
Fed. R. App. P. 28(a)(4); Fed. R. App. P. 28(b)
- ☐ Does the brief contain a statement of issues? (*Are they sensibly ordered? Are they consistently ordered in subsequent briefs? If, as appellee, you decide to rearrange the order of the propositions, is there a **really good reason** for doing so? If practical, you should identify the issue by content rather than just procedural stage—e.g., if the issue is whether the district court erred in granting summary judgment under the statute of limitations based on its rejection of a “continuing violation” theory, don’t just say the district court erred in granting summary judgment.*).  
Fed. R. App. P. 28(a)(5)
- ☐ Does the brief contain a statement of the case? (*Where are we procedurally at this point?*).  
Fed. R. App. P. 28(a)(6)
- ☐ Does the brief contain a statement of facts? (*Don’t, upon the pain of increasing and mounting appellate wrath, misstate or mischaracterize the facts! This is not a jury trial where you can see if you can get away with it. There is three times the likelihood that you won’t—and it will alienate your panel, and may result in imposition of costs even if you win.*)  
Fed. R. App. P. 28(a)(7)
- ☐ Does the brief contain a well-organized argument section, including: (A) a summary of the argument; and, for each issue raised, (B) a precise reference, with record citation, to the decision under review, and (C) a statement of the standard of review? Are only the relevant facts—not “default organization” facts—included?  
Fed. R. App. P. 28(a)(8), (a)(9)
- ☐ Does the brief contain a conclusion? (*Have you really thought carefully about what you are asking for? Might a cross-appeal redound to your detriment in terms of appellate fees and costs, or even losing a case you would have won without the*

*cross-appeal? Might the court's displeasure for a frivolous or unfounded cross-appeal be expressed in its opinion or order?).*

Fed. R. App. P. 28(a)(10)

- If oral argument has been requested, does the conclusion contain a statement of the reasons why oral argument is necessary? (*And, if you are the appellee and the appellant does not want oral argument, why would you risk adversity to your preferred position by requesting oral argument? Shouldn't you rely on the ruling below and your well-prepared brief?*).  
10th Cir. R. 28.2(C)(4); see 10th Cir. R. 1.1.
- Is a copy of the decision being reviewed attached to the appellant's brief? (***(See 10th Cir. R. 28.2(A)—and think about it! Give us the real document or relevant transcript, not a summary document that does not contain the court's reasoning. Note to appellees: under 10th Cir. R. 28.2 (B), if appellants omit such materials, you are obligated to cure the omission.)***)
- Are relevant portions of the relevant statutes, rules, regulations, and contracts attached to the brief? (*Is the Appendix paginated? Does it include a table of contents? Do you really want the judge to spend part of the precious time allotted to your brief searching in frustration for relevant unnumbered, untitled, unindexed documents?*)  
Fed. R. App. P. 28(f); 10th Cir. R. 30.1(C)(3); see *Travelers Indemnity Co. v. Accurate Autobody*, 340 F.3d 1118 (10th Cir. 2002) (holding that the failure of the parties to include the insurance policy at issue deprived them of the right to challenge the judgment of the district court).
- Is the brief signed by counsel properly admitted to the Tenth Circuit bar?  
10th Cir. R. 46.2(A)—admission to bar prerequisite to practice.
- Does the brief contain a certificate of compliance with type and volume limitations? (*And, the mere fact that you can use 14,000 words doesn't mean you have to. Tactically, if you can do it well with less, it is a sign of strength and not of weakness.*)  
Fed. R. App. P. 32(a)(7), 28(a)(11)
- Does the brief contain a certificate of service?  
Fed. R. App. P. 25(d); see also 10th Cir. R. 31.5  
(original and 7 copies of brief required).

## B. RULE 28(j) CHECKLIST

- ☐ Have I checked for supplemental authority *two or three weeks before the argument*? Fed. R. App. P. 28(j); 10th Cir. R. 31.5
  - ☐ Have I supplied any supplemental authority it to the court in order that the judges can consider it before oral argument?
  - ☐ Have I checked for supplemental authority the day before I leave for oral argument? (*Last minute supplemental authority is hard on the court, but even harder on parties who do not check to see if a white horse case has just come down. Note, however, a 28(j) letter supplied shortly before oral argument of a case that has been around for a couple of weeks or more just indicates that you have not done your homework.*)
  - ☐ Does the 28(j) letter refer to the page number(s) in the briefs that raise the argument that the new case addresses?
  - ☐ Have I cite-checked the letter?
  - ☐ Have I cited the relevant page number(s) in the new case?  
(*Or do I want the judge, once again, to spend a good portion of the time allocated to this case frustratingly searching for the relevant paragraph in a multiple-paged and otherwise irrelevant opinion?*)
  - ☐ Have I quoted relevant passages, using ellipses and brackets, if warranted, but carefully kept the quotation in context?
  - ☐ Have I re-checked the body of the letter to make sure that it provides a terse summary—or better yet, a quotation—of the relevant holding of the case and does not exceed 350 words?
  - ☐ Have I kept abreast of proposed rule changes pertaining to Fed. R. App. P. 28(j)?
- G** Have I remembered these same guidelines if I want to respond to opposing counsel's Rule 28(j) letter?

### C. GENERAL CONCERNS

- ☐ Has the brief been proofread?
- ☐ Has the brief been cite-checked as well as reviewed for substance?
- ☐ Has the brief been reviewed by an experienced colleague with no particular expertise in the area of law it addresses? (*Courts of appeal are supposedly staffed by “generalist” judges, and for good reason. Who knows how complicated certain areas of law would become if we only had specialist judges writing cases in those areas? Have an office generalist or a friend who is a lawyer and who doesn’t specialize in the area you are briefing read the brief.*)
- ☐ Does the brief contain abusive or strident language that insults the parties, opposing counsel, or the court? (*I suppose some of these briefs are written for the clients—but they are already for you and dislike the enemies on the other side anyway. Aspersions cast toward opposing counsel or parties are not helpful, and antagonize the court.*)
- ☐ If you are presenting an environmental case, for example, loaded with acrid acronyms, have you considered supplying a table of acronyms?
- ☐ If there is no reason to use an acronym, have you found a better term? (E.g., “the Act,” if there is only one at issue, might be better than some acronym.)

## D. ORAL ARGUMENT CHECKLIST

- ☐ Have I anticipated the weakest parts of my argument and thought about how to best respond to the judges' questions about these weaknesses? (*Judge Ebel's best appellate argument: "There are only two ways that I can lose this case: . . ."*)
- ☐ Have I done a moot court? (*The most experienced and noted advocates always do this.*)
- ☐ After the moot court, have I listened to my colleagues' evaluations and adapted my argument accordingly?
- ☐ Have I researched the law for new developments that have occurred since I have filed my brief?
- ☐ If I have found new developments, have I informed the court of them through a Rule 28(j) letter that complies with the court's requirements?  
See attached checklist for Rule 28(j) letters.
- ☐ Have I reviewed and tabbed the record in my final preparation for oral argument? (*"The other thing I might add on the checklist for part D (oral argument preparation) is something related to knowing the record on appeal (i.e., reviewing it again VERY carefully before argument). I see counsel get jammed on that all the time. Either they don't know the record, or they want to reference things/materials that were not before the district court and therefore aren't relevant here."*)
- ☐ Has my preparation prepared me to Answer the Question the Panel Asks? (*"You might want to remind counsel to answer the question which the panel asks and be flexible about that prepared text they have worked so hard on. Apart from not knowing the record, the only regular scenario where I see counsel get beat up a bit by the panel is when they won't answer the question asked."*)

## **E. GENERAL INFORMATION**

- ▶ Court rules, forms, and the Practitioner's Guide are available on the Tenth Circuit's Web Page: **[www.ck10.uscourts.gov](http://www.ck10.uscourts.gov)**.
- ▶ Daily updates on Tenth Circuit opinions are available on the Washburn University website at **[www.kscourts.org/ca10](http://www.kscourts.org/ca10)**.
- ▶ **Tenth Circuit rules are also available on Westlaw, but the above sources are "free" and more current.**
- ▶ **The general office line at the clerk's office is (303) 844-3157.**
- ▶ **The clerk's office will mail a Practitioner's Guide to anyone who asks for one. (The Guide contains a copy of the Court's rules). Call the main number at (303) 844-3157 to request one. They are sent every Friday.**
- ▶ **Court Clerk Patrick Fisher can be reached at (303) 844-5074.**
- ▶ **Counsel are encouraged to contact the appropriate geographic team (e.g. Western District of Oklahoma, etc.) if they have a basic question or a "did my brief get there" type of question. Call the general office line, (303) 844-3157, and say "I have a Western District of Oklahoma case. May I speak with that team?"**
- ▶ **If there are other questions, counsel should feel free to call the general number. The clerk's office will direct you to the right person.**